89-1950

Supreme Court, U.S.
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JUN 12 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROSS A. PHILLIPS,
Petitioner,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
FOREST SERVICE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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THE QUESTIONS PRESENTED FOR REVIEW

1. When the United States Court of Appeals for the Fourth Circuit, renders a decision that is in conflict with at least five (5) other United States Court of Appeals, should that decision be allowed to stand?

2. When the United States Court of Appeals for the Fourth Circuit, decides a federal question in a way that is in conflict with the state court of last resort in which the controversy arose, should that decision be allowed to stand, or should *Erie R.R. v. Tompkins* be expanded to correct that situation?

3. When the United States Court of Appeals for the Fourth Circuit sanctions a departure from the accepted and usual course of proceedings in a federal district court, should the United States Supreme Court exercise its powers of supervision over that decision and that court?

4. When a federal employee has four (4) Orders in his favor from three (3) different courts; and where those Orders have only been obeyed in part; and where the employee is denied a hearing on his request that those Orders be obeyed, has a denial of due process occurred under the *Fifth Amendment* of the *United States Constitution*?

A LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVERSED AS REQUIRED BY SUPREME COURT RULE 24.1(b)

Parties to the proceeding are as follows:

1. Ross A. Phillips, Petitioner
   286 Randolph Road
   Morgantown, West Virginia 26505
2. United States Department of Agriculture
   Forest Service
   Washington, D.C.
3. Secretary
   United States Department of Agriculture
   Forest Service
   Washington, D.C., Respondent
4. Solicitor General of the United States
   Department of Justice
   Washington, D.C. 20530
5. William A. Kolibash
   United States Attorney
   P.O. Box 591
   Wheeling, West Virginia 23003
6. Martin P. Sheehan
   Assistant United States Attorney
   P.O. Box 591
   Wheeling, West Virginia 23003
7. John R. Goodwin
   Attorney for Petitioner
   5250 E. Lake Mead Blvd., #48
   Las Vegas, Nevada 89115

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. ——

ROSS A. PHILLIPS,

Petitioner,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
FOREST SERVICE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, Ross A. Phillips, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-referenced matter on February 20, 1990, Petition for Rehearing denied on March 15, 1990, as reproduced in the Appendix hereto (App. A and B at pages 1a and 2a).

OPINIONS BELOW

The original opinion of the United States Court of Appeals for the Fourth Circuit which forms the basis for this application for a writ of certiorari is *Phillips v.*

Bergland, 586 F.2d 1007 (1978). The opinion is reproduced in the Appendix hereto (App. J at page 23a). Three Orders of the following courts, all favorable to Petitioner, are reproduced in the Appendix hereto as follows:

I. Order by the trial judge of the United States District Court for the Northern District of West Virginia, dated November 16, 1979, and reproduced in the Appendix hereto (App. H at page 20a).

II. Order of the (then) United States Court of Claims, dated March 3, 1981, and reproduced in the Appendix hereto (App. G at page 16a).

III. Order by the second trial judge of the United States District Court for the Northern District of West Virginia, dated May 14, 1987, and reproduced in the Appendix hereto (App. F at page 14a).

The fourth Order, which was not favorable to Petitioner, and which formed the basis of the second appeal to the United States Court of Appeals for the Fourth Circuit, was entered by the second trial judge of the United States District Court for the Northern District of West Virginia on September 15, 1989, and reproduced in the Appendix hereto (App. C at page 5a).

JURISDICTION

Petitioner seeks review of the Judgment of the United States Court of Appeals for the Fourth Circuit, entered on the 20th day of February, 1990, (App. A at page 1a); the Petition for Rehearing being denied on the 15th day of March, 1990, (App. B at page 4a). This Court's jurisdiction is invoked under 5 *USCS* section 5596; 5 *USCS* 7501 (a); the ruling of this Court in *Glines v. Wade*, 586 F. 2d 675 (1978); the *Fifth Amendment* to the *United States Constitution*, and 28 *USC* section 1254 (1).

STATUTES AND REGULATIONS

The Appendix hereto contains the following statute:

I. *Back Pay Act*, 5 *USCS* section 5596 (App. L at page 46a).

STATEMENT OF THE CASE

A. Nature of the Case

Petitioner brought suit in the United States District Court for the Northern District of West Virginia, Clarksburg, alleging that his discharge from the United States Department of Agriculture, Forest Service, was unlawful under 5 *USCS* section 7501(a), and seeking back pay under the *Back Pay Act*, 5 *USCS* 5596, for the years that he was off of the job. The jurisdiction of the District Court was invoked under these *Acts*. An order was entered against Petitioner on May 18, 1977, and Petitioner then timely sought relief in the United States Court of Appeals for the Fourth Circuit. (The case of *Glines v. Wade*, 586 F. 2d 675, was not to be decided until the following year). Petitioner was successful in the United States Court of Appeals for the Fourth Circuit, *Phillips v. Bergland*, 586 F. 2d 1007 (1978) (App. J at page 23a).

B. 1978 Ruling of the Fourth Circuit

The United States Court of Appeals held that since there was no showing that the discharge of Petitioner ". . . would promote the efficiency of the service . . ." as required by section 7501(a), 5 *USCS*, the firing was unlawful. *Phillips v. Bergland*, supra; *Young v. Hampton*, 568 F. 2d 1253, 1259, (7th Cir. 1977); *Schlegal v. United States*, 416 F. 2d 1372, 1377, 189 Ct. Cl. 30, *cert. denied* 397 U.S. 1039, 90 S.St. 1359, 25 L. Ed. 2d 650 (1970).

C. 1979 District Court Order

After reversal by the United States Court of Appeals for the Fourth Circuit, the United States District Court for the Northern District of West Virginia, on the 16th

day of November, 1979 (App. H, at page 21a) ordered Petitioner reinstated in the ". . . United States Department of Agriculture, Forest Service, forthwith, and at the pay scale and rank that he would have expected to attain had his employment not been terminated in 1974." Since the sum in controversy was in excess of Ten Thousand ($10,000.00) Dollars, this Order referred the matter to the United States Court of Claims ". . . wherein Ross A. Phillips, Plaintiff—Appellant, may pursue this claim, but wherein he will not have to relitigate those matters decided against Appellees" as per *Glines v. Wade*, 586 F. 2d 675 (1978) and *Phillips v. Bergland*, *supra* (App. H, at page 21a).

D. 1981 United States Court of Claims Order

In the (then) United States Court of Claims, *Ross A. Phillips v. The United States*, No. 69-80C, by Order dated March 3, 1981, (App. G at page 16a), the Federal District Court in West Virginia was ordered ". . . to determine the entire sum owed . . ." Petitioner "as a result of the Fourth Circuit proceedings . . . ."

This Order was then partially complied with, but the matter of promotion, and back pay for promition, was not settled and has not been settled to this day, nor has a hearing on that matter ever been given to the Petitioner.

E. Partial Compromise

After referral from the United States Court of Claims back to the Federal District Court, Petitioner agreed to compromise his claim for back wages from 1974 to 1980, by twenty-five (25%) percent, and was paid the sum of $79,697.30 counting benefits. In accepting this settlement, Petitioner specifically, and in writing, left open the matter of promotion from 1980 forward, and the pay for the promotion that he would have expected to have attained had he not been unlawfully fired, all of which was provided for in the 1979 Order of the District Court (App.

H at page 20a), and in the 1981 Order of the United States Court of Claims (App. G at page 16a).

F. 1985 Action to Enforce Compliance of 1979 Order

Repeated attempts to settle the promotion, and pay for promotion issues with Respondent, brought no response. The Petitioner then brought a motion to enforce compliance with the judgment Orders, pursuant to Rule 7 of the *Federal Rules of Civil Procedure.* (App. E at page 10a). This was done on September 19, 1985.

G. 1987 Order

Respondent made no response to this Petition. Over nineteen months (19) later, by Order dated May 14, 1987, the District Judge ordered Respondent to comply with the matters raised in the Petition (App. F at page 14a). In that Order the District Judge noted that ". . . The United States Attorney has filed no response to the motion as of this date, a time in excess of 19 months from the date of . . ." Petitioner's ". . . motion, thus the failure to respond is deemed an expression of counsel . . . not to oppose such motion." (App. F at page 15a).

H. 1989 Order Dismissing Case

The District Judge then asked the parties to prepare pretrial Orders which was done. After a brief phone conference on September 5, 1989, the District Judge (not the same one who entered the 1979 Order (App. I at page 22a), summarily overruled four (4) previous Orders (counting the Court of Appeals for the Fourth Circuit); ruled in favor of Respondent, and by Order dated September 15, 1989, (App. C at page 5a), dismissed the case without a hearing.

I. 1990 Petition for Rehearing and Denial

By Order dated the 20th day of February, 1990 (App. A at page 1a), the United States Court of Appeals for the Fourth Circuit denied the Appeal of Petitioner. Petitioner then filed a Petition for Rehearing which was

overruled by Order dated the 15th day of March, 1990 (App. B at page 4a).

Petitioner then brought this writ before this Court.

REASONS FOR GRANTING THE WRIT

At the time that Petitioner was unlawfully fired from the Forest Service in 1974, he had attained the rank of GS-12, Step 7. He had achieved this rank over a period of nine years with an unblemished work record. *Phillips v. Bergland*, 586 F. 2d 1007, at pages 1008 and 1009 (App. J at page 24a).

When Petitioner was rehired by Respondent in December, 1979, first-pay period of January, 1980, he was given the rank of GS-12, Step 9. This was an arbitrary determination of the United States Department of Agriculture, Forest Service. Petitioner was given no opportunity to present evidence as to the rank that he would have expected to have attained had his work performance not have been unlawfully discontinued for six (6) years. *Fuentes v. Shevin*, 407 U.S. 67 (1972).

Thus this case brings into sharp focus four legal issues.

I. THE 1979 ORDER OF THE UNITED STATES DISTRICT COURT WAS SIGNED BY ONE FEDERAL JUDGE, WHILE THE 1989 ORDER DISMISSING THE CASE WITHOUT A HEARING WAS SIGNED BY A SECOND JUDGE ON THE SAME COURT, AND THE RULING OF THE FOURTH CIRCUIT UPHOLDING THAT DISMISSAL, VIOLATES A LONG STANDING POLICY OF AT LEAST FIVE OF THE UNITED STATES COURTS OF APPEAL

The Judge that signed the November 16, 1979 Order, that ordered Petitioner reinstated at the pay scale and rank that he would have expected to have attained had his employment not been unlawfully terminated in 1974, was Charles H. Haden II, United States District Judge (App. I at page 22a).

The Judge that signed the September 15, 1989 Order, dismissing the case, was Robert E. Maxwell, United States District Judge, both Judges being of the same District Court and both Judges currently sitting on that Court. The 1989 Order not only overruled the 1979 Order, but the 1981 Order of the United States Court of Claims; the Order of Judge Maxwell of 1987, all in violation of a long-standing rule of the United States Courts of Appeal (App. C at page 5a).

This rule states that ". . . where a judge of a United States District Court or a judge assigned to a United States District Court, while a case is on his calendar, renders a decision and makes a judicial order in such case, and thereafter the case is transferred to the calendar of another judge of such District Court, the latter judge should respect and not overrule such decision and Order . . . ." *Stevenson v. Four Winds Travel*, 462 F. Rptr. 2d 899 at page 904. See also *Plattner Implement Co. v. International Harvester Co. of America*, 133 F. 376, 378, 379 (8th Cir.); *Donnelly Garment Co. v. National Labor Relations Board*, 123 F. 2d 215, 220 (8th Cir.); *Humphreys v. Bankers Mortg. Co. of Topeka Kan.*, 79 F. 2d 345, 352 (10th Cir.); *Travelers Indemnity Company v. United States*, 382 F. 2d 103, 107 (10th Cir.); *Price v. Greenway*, 167 F. 2d 196, 199 (3rd Cir.), *DiFrischia v. New York Central Railroad Company*, 279 F. 2d 141, 144 (3rd Cir.); and *In re Joslyn's Estate*, 171 F. 2d 159, 164 (7th Cir.).

II. THE DISMISSAL OF THE CASE BY THE 1989 ORDER, DIRECTLY VIOLATED A RULE OF THE WEST VIRGINIA SUPREME COURT OF APPEALS, AND THE RULING OF THE FOURTH CIRCUIT ALLOWS THAT VIOLATION TO REMAIN IN PLACE

The question now arises as to the application of West Virginia law to the present case. Petitioner understands that the rule of *Erie R.R. v. Tompkins*, 304 U.S. 64

(1938), applies to civil actions in which there is diversity of citizenship, a federal question, and more than the federal-jurisdictional amount in controversy.

But since Petitioner is diverse to Respondent, and since more than $50,000.00 is involved (the new jurisdictional sum), it would appear that the law of West Virginia should still be honored so long as it is consistent with the practices and good offices of the federal courts. It would seem that this is a case where that should be true.

The citizens of West Virginia should be allowed some consistency in the court decisions rendered there, whether they be state or federal decisions.

Under West Virginia law, it is the duty of the Circuit Court to require enforcement of an original judgment Order from that court, and such duty is ministerial and not discretionary and can be enforced by *mandamus*. *State ex. rel. Judy v. Kiger*, 153 WV 764, 172 S.E. 2d 579 (1970) (App. K at page 38a).

In the present case, the Federal District Judge treated the 1979 Order (App. I at page 22a) as being discretionary and stated in the September 15, 1989 Order (App. C at page 6a) ". . . promotional opportunities afforded (Petitioner) since reinstatement was a matter within the discretion of the officials of the U.S. Forest Service subject to review only under procedures set forth in the Code of Federal Regulations. . . ."

This Order of 1989 (App. C at page 5a) completely lost sight of the fact that Petitioner has been seeking promotion from the date of reinstatement as he would have expected to have attained, as previously ordered by the District Court in 1979.

Petitioner recognizes that the federal courts have a wide latitude to make amendments under Rule 15, *Federal Rules of Civil Procedure*, but a close reading of

Rule 7, *Federal Rules of Civil Procedure*, shows that such amendments apply only to "pleadings" and that word as defined in Rule 7, cannot be read to include judgment Orders. There is nothing in those rules that allows amendment of a judgment Order and that is what the Order of September 15, 1989 does (App. C at page 5a).

The law of West Virginia is clear that once a judgment Order is entered ". . . and not modified during the term at which it is entered *or appealed within the appellate period*, it is the duty of the circuit court . . . to require the enforcement of that judgment and such duty is not discretionary but is ministerial or nondiscretionary in character and may be enforced by *mandamus* proceedings . . . .", *State ex. rel. Judy v. Kiger*, supra at page 581 (App. K at page 41a). (Emphasis added since Respondent has never appealed any portion of this case).

Prior to the effective date of the *West Virginia Rules of Civil Procedure*, which were enacted in West Virginia in 1960, ". . . many decisions held that after the entry of a final judgment in a suit and adjournment of the term at which it was entered, the court can proceed no further in it by any adjudicatien affecting the rights or the interest of the parties . . . ." *State ex. rel. Judy v. Kiger*, supra, at page 583 (App. K at page 44a).

While the *Federal Rules of Civil Procedure* allow amendments of pleadings, it does not seem legal, or equitable for that matter, to allow that to happen to *an Order* almost ten (10) years to the day after it was entered by a Federal District Court. This is especially so in this case where there has been a consistent lack of formal objections from Respondent.

III. THE RULING OF THE FOURTH CIRCUIT SANCTIONS A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF PROCEEDINGS IN THE UNITED STATES COURTS OF APPEAL, NAMELY AT LEAST FIVE UNITED STATES COURTS OF APPEAL

The judgment Order of February 20, 1990 (App. A at page 1a), and the ruling on the Petition for Rehearing (App. B at page 4a), is in conflict with other Courts of Appeal, namely the Third, Fifth, Seventh, Eighth and Tenth Circuits, and this conflict is not addressed in that opinion. The conflict arises from the fact that the November 16, 1979 Order of the District Court was signed by one Judge (App. H at page 21a), and then was overruled by another Judge of the same District Court by Order dated September 15, 1989 (App. C at page 6a), both Judges currently sitting on that same United States District Court. This violates the long-standing rule set forth in II. above.

IV. THE RULING OF THE FOURTH CIRCUIT NEGATED THE OPPORTUNITY TO HAVE A HEARING ON THE ENFORCEMENT OF FOUR FAVORABLE ORDERS FROM THREE DIFFERENT COURTS, THUS PERFECTLY DENYING CONSTITUTIONAL RIGHTS UNDER THE *FIFTH AMENDMENT* OF THE *UNITED STATES CONSTITUTION*, SINCE THE ESSENCE OF DUE PROCESS IS THE RIGHT TO BE HEARD, *FUENTES v. SHEVIN*, 407 U.S. 67 (1972)

It appeared that Petitioner was going to be given this opportunity by the Order dated July 21, 1989 (App. D at page 9a), which set the case down for trial on September 18, 1989, but this was not to be since the District Judge dismissed the case on September 15, 1989 (App. C at page 5a).

Thus Petitioner was given something by the November 16, 1979 Order; given something by the Order of the

United States Court of Claims on March 3, 1981; was given something by the May 14, 1987 Order of the District Judge, all of which represented property rights, but all of which were taken away, without a hearing, in violation of *Fuentes v. Shevin*, 407 U.S. 67 (1972), by the Order of the second District Court Judge, on September 15, 1989 (App. C at page 5a).

CONCLUSION

Accordingly, a writ of certiorari should issue to review the judgment.

Respectfully submitted,

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Ross A. Phillips

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-1816

ROSS A. PHILLIPS,
Plaintiff-Appellant

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; FOREST SERVICE; NORTHEASTERN FOREST EXPERIMENT STATION; F. BRYAN CLARK, Director of the United States Department of Agriculture, Forest Service, Northeastern Forest Experiment Station
Defendants-Appellees

Appeal from the United States District Court
for the Northern District of West Virginia, at Elkins.
Robert Earl Maxwell, Chief District Judge. (CA-76-40-F)

Submitted: January 19, 1990 Decided: February 20, 1990

Before RUSSELL and CHAPMAN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

John R. Goodwin, Las Vegas, Nevada, for Appellant. William A. Kolibash, United States Attorney; Martin P. Sheehan, Assistant United States Attorney, Wheeling, West Virginia, for Appellees.

PER CURIAM:

Ross A. Phillips appeals the district court's dismissal of his motion to enforce a 1979 court order which directed the United States Forest Service to reinstate Mr. Phillips to his former position with that agency "at a pay scale and rank that he would have expected to attain had his employment not been terminated." Mr. Phillips had been improperly fired in 1974 for an altercation with a co-worker. *See Phillips v. Bergland*, 586 F.2d 1007 (4th Cir. 1978).

The central issue is whether the 1979 order was enforced when the Forest Service increased Mr. Phillips' salary from GS-12, step 7, to GS-12, step 9 upon his reinstatement. Mr. Phillips claims he "expected to attain" more than a two-step increase over the 1974-79 period. The district court found no objective evidence supporting Mr. Phillips' claim and dismissed the case. We affirm.

A civilian employee of the government who seeks a retroactive promotion must show that the promotion was mandated by a statute, regulation, or collective bargaining agreement, or otherwise "clearly establish" that he would have been promoted but for the improper government act. *Naekel v. Department of Transp., F.A.A.*, 850 F.2d 682, 683 (Fed. Cir. 1988); *Power v. United States*, 597 F.2d 258, 261-62 (Ct. Cl. 1979).

In this case, Mr. Phillips offered impressive credentials, his own opinion that he deserved a GS-16 rank, and an example of a coworker who attained a GS-16 rank over the pertinent time period. That does not clearly establish his claim.

The question then is what effect the 1979 order has on Mr. Phillips' burden to establish his claim. Mr. Phillips seems to argue that the 1979 order mandates a promotion consistent with his subjective expectations. However, the district court interpreted the order to mean expectations which are objectively reasonable. We

find no error in that interpretation, nor in the court's factual finding that a two-step promotion was all that Mr. Phillips could have expected. *See* Waiting periods for within grade increase, 5 C.F.R. § 531.405 (1989).

Mr. Phillips also claims the Forest Service unfairly denied him promotions after his reinstatement in 1979, but, as the district court noted, those promotion decisions were within the discretion of Forest Service officials and must be reviewed initially under the procedures set forth in the Code of Federal Regulations. *See* Classification Appeals, 5 C.F.R. § 511.601-16 (1989). The 1979 court order spoke to promotions due Mr. Phillips only at the time of his reinstatement.

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court, and argument would not aid in the decisional process.

Affirmed

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-1816

ROSS A. PHILLIPS,
Plaintiff-Appellant

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; FOREST SERVICE; NORTHEASTERN FOREST EXPERIMENT STATION; F. BRYAN CLARK, Director of the United States Department of Agriculture, Forest Service, Northeastern Forest Experiment Station,
Defendants-Appellees

ORDER

[Filed Mar. 15, 1990]

Upon consideration of the appellant's petition for rehearing,

IT IS ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Butzner with the concurrence of Judge Russell and Judge Chapman.

For the Court
/s/ John M. Greacen
Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
WEST VIRGINIA

Civil Action No. 76-40-F(H)

ROSS A. PHILLIPS,

Plaintiff,

vs.

U.S. DEPARTMENT OF AGRICULTURE FOREST SERVICE, NORTHEASTERN FOREST EXPERIMENT STATION, and F. BRYAN CLARK, Director of U.S. Department of Agriculture, Forest Service, and Northeastern Forest Experiment Station,

Defendants.

ORDER

[Sept. 15, 1989]

On September 5, 1989, the Court having received the Pretrial Order and Exhibits, scheduled a telephone conference on the above-styled matter. During said conference, it became clear to the Court that the principal difference between the parties was whether the prior orders relating to reinstatement of the plaintiff contemplated reinstatement at the level which he subjectively expected to reach or whether he should have been reinstated at the level which he objectively would have reached.

As this involves an interpretation of prior orders of the Court, it is a decision solely for the Court. The Court

finds that the proper interpretation relates to objective and, not subjective expectation. After making such decision, it appeared that no material issue of fact remained. The record discloses that plaintiff received two step within grade increases in pay when he was reinstated. The Court further finds that promotional opportunities afforded the plaintiff since reinstatement was a matter within the discretion of officials of the U.S. Forest Service subject to review only under procedures set forth in the Code of Federal Regulations, and for such other reasons as the Court indicated during the telephone conference, judgment is entered for the defendants and the matter DISMISSED from the above docket of the Court. The plaintiff's exception and objection to this order are noted.

/s/ Robert E. Maxwell
ROBERT E. MAXWELL
United States District Judge

ENTER: September 15, 1989.

PREPARED BY:

/s/ Martin P. Sheehan
MARTIN P. SHEEHAN
Assistant United States Attorney
for the Northern District
of West Virginia

AGREED TO AS TO FORM:

/s/ Mike Magro, Jr.
MIKE MAGRO, JR.
Attorney for the Plaintiff

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
WEST VIRGINIA

Civil Action No. 76-0040-F

ROSS A. PHILLIPS,
Plaintiff,

v.

U.S. DEPARTMENT OF AGRICULTURE, ETC., *et als.*,
Defendants.

ORDER

[Filed July 21, 1989]

It appearing to the Court that the remaining issue pending in the above-styled civil action has matured to the stage where the time is now ripe for counsel to meet and seriously direct their attention toward the development of a full and complete pretrial order pursuant to Local Court Rule 2.13(c), counsel for plaintiff is directed to take the initiative in arranging a conference of the attorneys of record for the purpose of submitting a final pretrial order to the Court for entry on or before August 31, 1989.

In addition to the requirements of Local Court Rule 2.13(c),

(1) The parties shall advise the Court of the necessity for a jury trial in the above-styled matter. If this action is to be tried to a jury, each of the parties shall

submit its proposed *voir dire* and to the jury on or before ten (10) days prior to trial. Counsel are required to submit their suggested charge in narrative form, keeping in mind that the charge should encompass all rules of law applicable to the evidence anticipated to be presented. Appropriate citations should be noted by the use of footnotes. In the event this action is one in which a jury is not required, the parties shall file their proposed findings of fact and conclusions of law on or before ten (10) days prior to trial and also shall, on or before August 31, 1989, advise the Court of their objections, if any there be, to the empaneling of an advisory jury at the trial of the above-styled matter;

(2) On or before ten (10) days prior to trial, the parties shall submit to the Clerk of the Court a biographical sketch of any proposed expert, along with a list of any materials upon which the said expert intends to rely at trial. Failure to comply with this paragraph may result in the Court's precluding the testimony of such expert; and

(3) On or before ten (10) days prior to trial, the parties shall submit a list of proposed exhibits to the Clerk of Court, having, prior thereto, either forwarded copies of the said proposed exhibits or made the same available to all other counsel for examination. The said list shall include any interrogatories, answers thereto, depositions, etc., specifying the appropriate portions thereof which the parties intend to offer in this cause. If less than a complete deposition is to be read to the jury, or presented to the Judge for reading, the party so offering shall highlight the tendered portions. The other party, or parties, may do likewise in designating such additional portions as such party wishes to offer or contends should, in fairness, be read. All exhibits shall be appropriately marked in sequence. Exhibit markers may be secured from the Clerk of Court. Each party shall supply a copy of each proposed exhibit for use by the

trial judge. Any objections to the introduction of any of the proposed exhibits shall be submitted in writing by each of the parties no later than five (5) days prior to trial. Failure to comply with this paragraph may constitute waiver of objections or may result in the Court's denying the admission of the affected exhibit(s). This paragraph is not intended to apply to discovery materials which will be used at trial solely for the purposes of cross-examination or for impeachment.

It is further.

ORDERED that a trial of the above-styled civil matter will be held beginning at 9:00 A.M. on September 18, 1989, at the Federal Courthouse in Elkins, West Virginia.

DATED: July 21st, 1989

/s/ Robert E. Maxwell
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
WEST VIRGINIA

Civil Action No. 76-40-F(H)

ROSS A. PHILLIPS,
Plaintiff,

vs.

BOB BERGLAND, *et al.*,
Defendants.

MOTION TO ENFORCE COMPLIANCE
WITH JUDGMENT ORDER, PURSUANT TO
RULE 7 OF THE FEDERAL RULES OF
CIVIL PROCEDURE (F.R.C.P)

[Filed Oct. 1, 1987]

Comes now the plaintiff, Ross A. Phillips, by counsel, Mike Margo, Jr., and moves the Court for an Order commanding the defendants to comply with the Judgment Order entered on May 14, 1987, a copy of which is hereto attached as Exhibit A.

Specifically, that the plaintiff, Ross A. Phillips, be promoted from General Service Rating (G.S.-12) to General Service Rating (G.S.-16), which said General Service Rating (G.S.-16) is the rank that the said plaintiff would have expected to attain had his employment not been terminated in 1974.

Plaintiff further says that in light of the language of the Court, as contained in said Exhibit A, and the ap-

parent conspiracy of silence of Defendants, plaintiff moves that an Order be entered by this Court, directing and commanding those employees, agents and servants of the United States Government, as designated and listed on Exhibit B attached hereto, who would be the appropriate individuals to implement said Court Order entered on May 14, 1987, to appear before this Court to show cause why the aforesaid Order of this Court has not been implemented and consummated, and to otherwise be dealt with according to law.

Plaintiff further moves that he be compensated in accordance therewith, by receiving back pay, and likewise for the Court to adjudicate reasonable attorney fees.

ROSS A. PHILLIPS
By Counsel

/s/ Mike Magro, Jr.
MIKE MAGRO, JR.
Attorney at Law
212 High Street
Morgantown, West Virginia 26505
Counsel for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
WEST VIRGINIA

Civil Action No. 76-40-F(H)

ROSS A. PHILLIPS,
Plaintiff,

vs.

BOB BERGLAND, *et al.*,
Defendants.

NOTICE

TO: WILLIAM A. KOLIBASH
United States Attorney for the
Northern District of WV
Post Office Box 591
Wheeling, West Virginia 26003
Counsel for Defendants

Please take notice that the undersigned will bring the annexed MOTION TO ENFORCE COMPLIANCE WITH JUDGMENT ORDER, PURSUANT TO RULE 7 OF THE FEDERAL RULES OF CIVIL PROCEDURE (F.R.C.P.) on for hearing at such time as this Honorable Court shall hereafter designate and fix.

/s/ Mike Magro, Jr.
MIKE MAGRO, JR.
Attorney at Law
212 High Street
Morgantown, West Virginia
26505
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I do hereby certify that I have served a true copy of the foregoing NOTICE and MOTION TO ENFORCE COMPLIANCE WITH JUDGMENT, PURSUANT TO RULE 7 OF THE FEDERAL RULES OF CIVIL PROCEDURE (F.R.C.P.) UPON William A. Kolibash, United States Attorney for the Northern District of West Virginia, Counsel for the Defendants herein, by placing the same in the United States Mail, first class, postage prepaid, in an envelope addressed to him, at his office address of Post Office Box 591, Wheeling, West Virginia, 26003, ALL on this 30th day of September, 1987.

/s/ Mike Magro, Jr.
MIKE MAGRO, JR.
Attorney at Law
212 High Street
Morgantown, West Virginia
26505

Counsel for Plaintiff

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
WEST VIRGINIA

Civil Action No. 76-40-F(H)

ROSS A. PHILLIPS,

Plaintiff,

v.

U.S. DEPARTMENT OF AGRICULTURE, FOREST SERVICE, NORTHEASTERN FOREST EXPERIMENT STATION, and F. BRYAN CLARK, Director of U.S. Dept. of Agriculture, Forest Service, and Northeastern Forest Experiment Station,

Defendants.

ORDER

[Filed May 14, 1987]

The Court has received Plaintiff's Motion to Enforce Compliance with Judgment Order. The Motion is supported by a Memorandum and an Affidavit of the Plaintiff. Specifically, Plaintiff requests that he be promoted from General Service Rating (G.S.-12) to General Service Rating (G.S.-16). The higher General Service Rating is the rank that Plaintiff had expected to attain had his employment not been terminated in 1974. Plaintiff moves this Court for an Order directing the Defendants to comply with the Judgment Order entered on November 16, 1979 by the Honorable Charles H. Haden II. By previous

Order of this Court the parties were directed to file all motions within the time frame set forth therein. The Plaintiff's Motion and Affidavit was filed with the Court on September 19, 1985, and the Certificate of Service attached thereto reflects that a true copy of said motion was served by mail on William A. Kolibash, United States Attorney for the Northern District of West Virginia, on September 18, 1985. The United States Attorney has filed no response to the Motion as of this date, a time period in excess of 19 months from the date of Plaintiff's motion, thus the failure to respond is deemed an expression of counsel for the defendants not to oppose such motion. Upon consideration of the Motion and the matters set forth in said Motion and Affidavit, and the entire record in this case, it is accordingly

ORDERED that the Defendants apply the appropriate statutes, regulations and customary guidelines for General Service ratings to the evaluation of Plaintiff's employment, as the same may relate to the advancement of his employment status, from the time of entry of the Judgment Order herein entered on November 16, 1979 by the Honorable Charles H. Haden II until the date of the entry of this Order.

ENTER: May 14th, 1987.

/s/ Robert E. Maxwell
United States District Judge

APPENDIX G

IN THE UNITED STATES COURT OF CLAIMS

No. 69-80C

ROSS A. PHILLIPS

v.

THE UNITED STATES

Civilian pay; removal of federal employee; suit for back pay in this court based on another court's order of reinstatement; offsets; no attorney's fees or costs.

[Filed Mar. 3, 1981]

John R. Goodwin, attorney of record, for plaintiff.
Mary Mitchelson, with whom *Acting Assistant Attorney General Thomas S. Martin*, for defendant.

Before DAVIS, *Judge*, Presiding, KASHIWA and BENNETT, *Judges*.

ORDER

This pay case, which was submitted without oral argument, is before the court on cross-motions for summary judgment (the defendant's motion is for partial judgment). There is no dispute as to the facts. In a

prior action, which came to it from the Northern District of West Virginia, the Court of Appeals for the Fourth Circuit held that Mr. Phillips, a civil servant, had been improperly removed from his federal post and directed his reinstatement. *Phillips v. Bergland*, 586 F.2d 1007 (1978). Thereafter, on remand, the District Court ordered plaintiff reinstated and referred the issue of back pay for the improper removal to this court. Plaintiff was reinstated to his former position GS-830-12, step 9. This suit was then filed here. Defendant does not here dispute any of the factual determinations made in the Fourth Circuit's decision.

The first issue in this court is the amount of back pay due plaintiff in the position from which he was separated. The parties agree that the gross sum is $142,042.00. This must, however, be offset by actual outside earnings or by any amount plaintiff could have reasonably earned by seeking and obtaining employment at the minimum wage, under the principles set forth in *Power v. United States*, 220 Ct. Cl. —, —, 597 F.2d 258, 263-65 (1979), *cert. denied*, 444 U.S. 1044 (1980). Appropriate reductions must also be made for such things as income taxes, retirement, and life insurance. This matter of the net award for back pay will therefore have to be remanded to a trial judge for determination under Rule 131(c)(2).

The second issue is plaintiff's entitlement to promotion to the pay scale and rank that he would have been expected to attain had his employment not been improperly terminated in 1974. That requirement was part of the District Court's order of reinstatement, and plaintiff contends that that part of the order has not been fulfilled by the agency. Plaintiff now admits, however, that this court cannot enforce that part of the District Court's order (*see United States v. Testan*, 424 U.S. 392 (1976)), and asks instead that we refer this matter back to the District Court. It is unnecessary to consider whether we should order such a transfer under the transfer statute,

28 U.S.C. § 1506. Plaintiff can readily apply to the District Court for relief if that court's order has not been properly followed by the agency.

Plainiffs third demand is for attorney's fees. The only possibility for an allowance of attorney's fees by this court would be under the Civil Service Reform Act. But any such claim is barred by *Nibali v. United States*, 222 Ct. Cl. —, (decided August 13, 1980), which held that civilian pay cases pending before this court of the effective date (January 11, 1979) of that Act could not take advantage of the provisions of that statute allowing attorney's fees in certain circumstances. That conclusion applies as well to federal personnel suits pending in other courts—as plaintiff's proceedings were pending in the Fourth Circuit—on the effective date of the Civil Service Reform Act. There is absolutely no reason in the statute or in principle why we should be authorized to award attorney's fees in cases then pending in other courts but not those pending in our own.

Finally, plaintiff requests costs, but as a matter of practice this court has not granted costs to any party. *See Rasmussen v. United States*, 211 Ct. Cl. 260, 275 n.20, 543 F.2d 134, 142, n.20 (1976). We are asked at least to recognize and award a judgment for the costs of $370 said to have been previously allowed in the Fourth Circuit. Defendant agrees that, if that sum is established as part of the sums owed to plaintiff by defendant, the trial judge on remand can include that sum in the amount of recovery. But defendant objects to our award of any sum as a judgment specifically for costs. We agree and authorize the trial judge to determine the entire sum owed by defendant as a result of the Fourth Circuit proceedings, including any unpaid amount owed to plaintiff because of costs allowed in that Circuit.

Accordingly, IT IS ORDERED that plaintiff's and defendant's motions for summary judgment are granted and denied in accordance with this order and the case is re-

manded to the trial judge under Rule 131(c)(2) for a determination pursuant to this order of the amount of recovery. Those parts of the petition on which this order holds that there can be no recovery are dismissed.

BY THE COURT
/s/ Oscar H. Davis
OSCAR H. DAVIS
Judge

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
WEST VIRGINIA

Civil Action No. 76-40-F(H)

ROSS A. PHILLIPS,

Plaintiff,

vs.

BOB BERGLAND, *et al.*,

Defendants.

ORDER

[Filed Nov. 19, 1979]

This 15th day of November, 1979, came the Plaintiff-Appellant, Ross A. Phillips, by his counsel, John R. Goodwin, Attorney at Law, and came Bob Bergland, et al, Defendants-Appellees, by their counsel, William A. Kolibash, Assistant United States Attorney, upon the original ruling the United States Court of Appeals, Fourth Circuit, rendered November 17, 1978, and originally mandated December 8, 1978, in which said ruling the Court held that ". . . the judgment of the District Court is reversed and the cause is remanded to the District Court for the entry of appropriate judgment in favor of the appellant", and upon that certain Order of the said United States Court of Appeals, entered March 16, 1979, holding that Defendants-Appellees motion for a rehearing is denied and that ". . . on remand, the judgment to be entered by the District Court should be confined to equitable relief . . .," the Court citing *Glines v. Wade,* (9th Cir.

1978) 586 F.2d 675, 681, and it appearing the proper thing to do, it is

ORDERED that Ross A. Phillips, Plaintiff-Appellant, be and he is hereby reinstated to his job with the United States Department of Agriculture, Forest Service, forthwith, and at the pay scale and rank that he would have expected to attain had his employment not been terminated in 1974.

As per the *Glines* holding, the matter of back pay for Ross A. Phillips, being in excess of Ten Thousand Dollars ($10,000), and fee and cost, if any, is hereby referred to the United States Court of Claims, wherein Ross A. Phillips, Plaintiff-Appellant, may pursue this claim, but wherein he will not have to relitigate those matters decided against Defendants-Appellees in the United States Court of Appeals, Fourth Circuit, *Ross A. Phillips v. Bob Bergland et al*, No. 77-2234 (1978), as per the *Glines* ruling above.

The Clerk will enter this Order as provided by law, to all of which the Defendants-Appellees object and take exception.

ENTER: 11/16/79
/s/ Charles H. Haden II
CHARLES H. HADEN II
United States District Judge

Approved for entry:
/s/ John R. Goodwin
JOHN R. GOODWIN
For Plaintiff-Appellant

/s/ William A. Kolibash
WILLIAM A. KOLIBASH
For Defendants-Appellees

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF WEST VIRGINIA

Civil Action No. 76-40-F(H)

ROSS A. PHILLIPS,

Plaintiff,

vs.

BOB BERGLAND, *et al.*,

Defendants.

JUDGMENT ORDER

[Filed Nov. 19, 1979]

Pursuant to the mandate of the United States Court of Appeals for the Fourth Circuit in the case of *Ross A. Phillips* v. *Bob Bergland, et al.*, No. 77-2234, the Court hereby ORDERS the following:

(1) That Ross A. Phillips be, and he is hereby, reinstated to his job with the United States Department of Agriculture, Forest Service, at the pay scale and rank that he would have expected to attain had his employment not been terminated in 1974;

(2) That this case be, and it hereby is, dismissed from the docket of this Court.

The Clerk is directed to send a certified copy of this Judgment to all counsel of record.

ENTER: 11/16/79
/s/ Charles H. Haden II
CHARLES H. HADEN II
United States District Judge

APPENDIX J

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 77-2234

ROSS A. PHILLIPS,

Appellant,

v.

BOB BERGLAND, Secretary of Agriculture, United States Department of Agriculture, in his official capacity and not in his Individual capacity, Washington, D.C. and ROBERT E. HAMPTON, Chairman, Civil Service Commission, in his official and representative capacity and not in his Individual capacity, 1900 E. St., NW, Washington, D.C. 20415,

Appellees.

Argued June 9, 1978

Decided Nov. 17, 1978

John R. Goodwin, Charleston, W. Va., for appellant.

William A. Kolibash, Asst. U.S. Atty., Wheeling, W. Va. (Stephen G. Jory, U.S. Atty., Elkins, W. Va., on brief), for appellees.

Before BRYAN, Senior Circuit Judge, and RUSSELL and HALL, Circuit Judges.

DONALD RUSSELL, Circuit Judge:

The appellant, employed as a Research Mechanical Engineer, GS-12, in the Forest Service of the United States Department of Agriculture, Morgantown, West Virginia, filed this action in the District Court seeking review of

his discharge, as approved in a decision of the Civil Service Commission's Appeals-Review Board (ARB) on February 20, 1976. Both the appellant and the appellees moved for summary judgment on the administrative record. The District Court granted the motion of the appellees for summary judgment and dismissed the action. The appellant appealed. We reverse.

The appellant had been employed by the Forest Service for nine years before the incident which lead to his discharge. There is no suggestion by the ARB that during this period of service he had not been a faithful and efficient employee or that his relations with his supervisors and fellow-employees had not been cooperative and cordial. The appellant testified, without contradiction that at no time during his employment had he been disciplined or censured. And, as a matter of fact, the incident resulting in his discharge did not relate to his performance as an employee,—it arose purely and simply out of a personal difficulty with a fellow-employee over a private business in which the two had engaged and a debt owed by such private business.

The private business out of which the appellant's difficulty with a fellow-employee arose was a retail tire business in Elkins, West Virginia. The business, known as the Elkins Auto Center, was operated as a corporation in which the appellant and one Biller, a fellow-employee, had equal ownership of the stock. For their stock, the appellant and Biller had each paid approximately $10,000. The appellant, however, had advanced from the funds of his three minor sons, approximately $20,000 additional to the corporation. The business was located in a building rented by the corporation from Biller. It was not a successful venture. The reason for its failure is not clear but it was the appellant's belief that Biller was responsible for the business' failure.

As the business began to flounder, Biller claimed to have transferred his stock in the corporation to the ap-

pellant and to have disassociated himself from the business. The actual date of the assignment by Biller of his stock to the appellant was, however, subsequent to the business' failure and also subsequent to the incident in question. In any event, as the business was failing, Biller began "pushing and pushing" the appellant individually to pay the back rent due him by the corporation. On the Friday before the pertinent incident on Monday, April 9, the tire supplier of the business repossessed all the then stock of the corporation. At that point the corporation had nothing but some few doubtful accounts-receivable and substantial unpaid debts. The appellant was out his $10,000 investment and the $20,000 he had advanced from the inheritance of his minor sons. It was with this background that the appellant reported for work on the morning of April 9.

After the appellant had begun work on April 9, Biller went to appellant's office where he found him quite distraught. He immediately began pressing the appellant to pay the back rent due him individually by the defunct corporation in which the two had been involved.[1] Biller emphasized that he expected payment by noon of that day. When the two took their lunch-break the appellant

[1] The propriety of Biller's action in pressing the appellant for payment of the corporation's debt to him while both men were supposed to be working, would seem open to some question. While both he and the appellant were at work was not the proper occasion for Biller to be seeking to collect from a fellow-employee a personal debt, or to have been interrupting him at his work for that purpose. Certainly, he could hardly have expected that the appellant could hardly have expected that the appellant could have raised the necessary funds to pay the debt by the noon-break of the two. If Biller had been a bill-collector rather than a fellow-employee, his action in "hounding" the appellant at his work over the back rent would likely have violated the provisions of the Fair Debt Collection Practices Act § 1692c(a)(3), 15 U.S.C. However, it would be no less objectionable in principle, if not under the Act, because Biller was acting for himself and not as a bill-collector, as defined in the Act.

suggested that the two of them go to some place where they could talk in private. They withdrew to "an enclosed stairway separated from the rest of the building," occupied by the local unit of the Forest Service. As they reached the stairway, the appellant, who had been walking behind, threw what the ARB described as a "rope" and what Biller suggested at one point was similar in some respects to "binder's twine" about Biller's neck. What pressure, if any, the appellant applied is not clear. In any event it was not enough to leave any marks on Biller's neck, only eenough to cause, as Biller characterized it, a burning sensation on his "neck and Adam's apple." The ability of Biller to talk was not interfered with. When examined later by a doctor Biller was dismissed without any treatment or medication, and without any observable injury.[2] The appeallant, so far as the record shows, did not hit Biller or otherwise molest him. Actually, Biller was some twenty years younger than appellant and as he admitted, he was "a pretty husky fellow," larger than the appellant. When this all happened, Biller looked out the window, saw a friend, and asked him to help him. The friend, a fellow-employee named Pruett, came in, touched appellant and told him to stop. The appellant promptly complied. That was the extent of the incident.

At the suggestion of Pruett, Biller and the appellant went to their supervisor and reported the incident. The appellant gave as his explanation that he was emotionally upset, that he needed psychiatric treatment, and that Biller "kept pushing me and pushing me." Biller replied directly to the appellant, "Well, Ross, you have to make

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[2] Biller, in his testimony, seeks to discount his curt dismissal by the physician with the statement that the doctor wanted to retire. It is significant, though, that he never saw another physician nor does he even now claim that he suffered anything more than the burning sensation which twine will ordinarily cause.

the payments." [3] At this point the appellant was taken to the West Virginia University Hospital, where, over the period of the next nine days, he was given a series of shock treatments. At the conclusion of these shock treatments, the appellant was certified by the attending physician as qualified to return to work. However, within two days after the incident and while the appellant was, to the knowledge of the supervisor, being given psychiatric treatment at the University Hospital, the appellant was advised by the Director of his unit that his discharge was being considered for "Conduct Prejudicial to the Best Interest of the Service and Disgraceful Conduct." This "Disgraceful Conduct" was the appellant had "placed a rope around his [Biller's] neck and began choking him. This choking continued until another employee, Emerson Pruett, heard Mr. Biller's call for help from the second floor hall and intervened." The appellant was given ten days within which to answer the charge. The discharge proceedings followed the administrative ladder up to the Civil Service Commission's Appeals-Review Board, which sustained the appellant's discharge because of his difficulty with Biller. Following that decision, this action was begun in the District Court. From an unfavorable decree of the District Court, this appeal followed.

The decision in this case turns on the power of an agency to discharge and the circumstances under which such power may be exercised. Congress has expressly denied to an agency the right to discharge or suspend a civil service employee save for "such cause as will promote the efficiency of the service." [4] This is to say that "[s]imply having an identifiable cause [for discipline] is not sufficient to warrant adverse action" against a civil service employee; under the statute the adverse action must

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[3] The debt for the rent was the debt of the corporation. It was obvious, though, that Biller was pressing the appellant to pay the debt personally.

[4] § 7501(a), 5 U.S.C.

be " 'for such cause as will promote the efficiency of the service.' " [5] It follows that in every case of an adverse action against a governmental employee, the agency must, as an essential predicate for its action, make two affirmative determinations, *i.e.*, it must determine (1) "that the employee misconduct has, in fact, occurred," and (2) "that the disciplinary action taken against the employee will 'promote the efficiency of the service.' " [6] Accordingly the mere fact that the employee has committed an immoral or disgraceful act—even a criminal act—will not justify a discharge unless it can be said that there is what the court has described as a "vital nexus" between the act and the "efficiency of the service."

There is, of course, some conduct with respect to which the "nexus between the dismissed employee's activities and the efficiency of the service" is "obvious on the face of the facts." [7] Typical of conduct, which carries on its face prejudice to the service as contemplated in § 7501 (a), are falsification of work records or expense accounts,[8] theft of government property,[9] assault on one's supervisor at work,[10] and insubordination.[11] All of these

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[5] *See Young v. Hampton* (7th Cir. 1977) 568 F.2d 1253, 1259.

[6] *Young v. Hampton, supra,* at 1257 (568 F.2d).

Of these the more important—the one which expresses that statutory limitation on an agency's right of action—is the requirement of a finding that the discharge will "promote the efficiency of the service."

[7] *Young v. Hampton, supra,* at 1260-1261 (568 F.2d).

[8] *Jones v. Priebe* (6th Cir. 1973) 489 F.2d 709-710.

[9] *Alsbury v. United States Postal Serv.* (9th Cir. 1976) 530 F.2d 852, 855, *cert. denied* 429 U.S. 828, 97 S.Ct. 85, 50 L.Ed.2d 91.

[10] *Christie v. United States,* (Ct.Cl.1975) 518 F.2d 584, 586; *Ruffin v. United States* (1959) 144 Ct.Cl. 689.

[11] *Brancadora v. Federal Nat. Mortg. Ass'n.* (9th Cir. 1965) 344 F.2d 933, 934; *Kessler v. General Services Administration* (S.D.N.Y. 1966) 252 F.Supp. 629, 630.

are without question related to the faithful and loyal performance of his duties by an employee and are work-related. They are quite different from misconduct which is entirely unrelated to the employee's work and which occurs when the employee is off duty. And the courts have recognized that distinction and have made plain the greater burden which rests on the agency to justify its action in the latter case. Thus, in *Schliegel v. United States* (1969) 416 F.2d 1372, 1377, 189 Ct.Cl. 30, *cert. denied* 397 U.S. 1039, 90 S.Ct. 1359, 25 L.Ed.2d 650 (1970), the Court said:

> "Misconduct [of a federal employee] while off duty does not, in itself, serve as a basis for removal. There must be a showing that the misconduct affected the employee's performance on the job * * *"

Another case has stated the "vital nexus" requirement in the off-duty or non-work-related case as raising the question "whether the asserted grounds for the adverse action, if found supported by evidence, would directly relate either to the employee's ability to perform approved tasks or to the agency's ability to fulfill its assigned mission." [12]

Nor does the agency satisfy its obligation under the statutory authority by merely parroting the language of the statute (*i.e.*, that the discharge will "promote the efficiency of the service"). This was bluntly declared in *White v. Bloomberg* (D.Md.1972) 345 F.Supp. 133, 144, *aff'd.* 501 F.2d 1379 (1974):

> "Without ignoring the safeguards against arbitrary dismissal from public employment which are embodied in that statute and in those regulations, an employer agency cannot justify a discharge merely by reciting in conclusory fashion the language of the

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[12] *Doe v. Hampton* (1977) 184 U.S.App.D.C. 373, 566 F.2d 265, 272, n.20.

> statute. Instead, the agency 'must demonstrate some "rational basis" for its conclusion that a discharge "will promote the efficiency of the service." ' "

Except in the obvious case where the misconduct is on its very face prejudicial to the efficiency of the service—a category of misconduct limited to acts directly related to the employee's performance of his duties—the agency " 'must demonstrate some "rational basis" for its conclusion that a discharge "will promote the efficiency of the service".' " [13] The determination whether the misconduct of an employee is of such a serious nature as to implicate "the efficiency of the service," is ordinarily committed to the discretion of the Commission. While the discretion thus given the Commission is a broad one, it is not an unlimited one and may be reviewed judicially for abuse of discretion, arbitrariness or capriciousness both with respect to the substantive issue and, under recent authorities with respect to the penalty itself.[14] There is confusion in the decisions, however, on the standard of judicial review to be applied in determining whether the agency action was arbitrary.

A majority of the jurisdictions declare the standard for judicial review to be the substantial evidence rule.[15] Under this standard, the findings of the Commission must be based on " 'such relevant evidence as a reasonable

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[13] *White v. Bloomberg, supra,* at 144 (345 F.Supp.).

[14] *See Boyce v. United States* (Ct.Cl.1976) 543 F.2d 1290, 1292-1294.

[15] *Alsbury v. United States Postal Serv., supra,* at 854 (530 F.2d); *Terry v. United States* (1974) 499 F.2d 695, 704, 204 Ct.Cl. 543, *cert. denied,* 421 U.S. 912, 95 S.Ct. 1567, 43 L.Ed.2d 777 (1975); *Jones v. Priebe, supra* at 710 (489 F.2d); *Polcover v. Secretary of Treasury* (1973) 155 U.S.App.D.C. 338, 477 F.2d 1223, 1231, *cert. denied* 414 U.S. 1001, 94 S.Ct. 356, 38 L.Ed.2d 237; *Charlton v. United States* (3d Cir. 1969) 412 F.2d 390, 395; *Gray v. Macy* (9th Cir. 1966) 358 F.2d 742, 743; *Porter v. Mathews* (N.D.Ala.1976) 428 F.Supp. 711, 715.

mind might accept as adequate to support a conclusion.'" [16] On the other hand, several jurisdictions have adopted the rule that the findings of the Commission are to be reviewed under a standard of "a rational basis" for the agency's findings, particularly as they relate to the "efficiency of the service." [17] By this standard, the action of the Commission in disciplining a Government employee will be found to be arbitrary unless the Commission "demonstrates some rational basis" for its findings. It would seem that this Circuit adopted the "substantial evidence" rule in *Halsey v. Nitze*,[18] "arbitrary, unreasonable, capricious, or not supported by substantial evidence." Whether we shall continue to follow such standard in Government discharge cases or will opt, as one or two Circuits have, for the "rational basis" standard is, however, not important in this case, since, in our opinion, the discharge of the appellant cannot be sustained under either standard.

The decision of the Commission in this case proceeded on the false assumption that "[t]here is no requirement that the agency state specifically that the proposed action will promote the efficiency of the service or that it explain why it believes the action will promote the efficiency of the service." In adopting this view, the Commission was merely following the recommendation of its Director of Personnel Management, who, recognizing that at none of the intermediate steps in the proceedings had the "effi-

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[16] *Labor Board v. Columbian Co.* (1939) 306 U.S. 292, 300, 59 S.Ct. 501, 505, 83 L.Ed. 660, quoting *Consolidated Edison Co. v. National Labor Relations Board* (1938) 305 U.S. 197, 229, 59 S.Ct. 206, 83 L.Ed. 126.

[17] *Hurley v. United States* (10th Cir. 1978) 575 F.2d 792, 794; *Young v. Hampton* (7th Cir. 1977) 568 F.2d 1253, 1257; *Wroblaski v. Hampton* (7th Cir. 1976) 528 F.2d 852, 853; *Wood v. United States Post Office Department* (7th Cir. 1973) 472 F.2d 96, 99, *cert. denied*, 412 U.S. 939, 93 S.Ct. 2775, 37 L.Ed.2d 399; *Norton v. Macy* (1969) 135 U.S.App.D.C. 214, 417 F.2d 1161, 1165.

[18] 390 F.2d 142, 144 (1968); *cert. denied* 392 U.S. 939, 88 S.Ct. 2316, 20 L.Ed.2d 1399.

ciency of the service" been addressed, had said that "[f]ailing to spell out how removal would promote the efficiency of the service is not necessarily a fatal error as determined in *Begendorf v. United States*, 340 F.2d 362, 169 Ct.Cl. 263 (1965)." [19] But, as we have seen, the Courts have made quite clear that, except for the rare case involving a work-related act while on duty, the agency must "spell out how removal would promote the efficiency of the service" and spell it out with such definiteness and specificity that the reviewing court may "be able to discern some reasonably foreseeable, specific connection between an employee's potentially embarrassing conduct and the efficiency of the service." [20] And, as we have said, this necessity arises particularly where the alleged misconduct occurs when the employee is off-duty. Accordingly, even where the employee has been convicted of the felony of possession of marijuana,[21] or of sexual misconduct,[22] or even of shooting another person,[23] the courts have found no "rational basis" for a discharge because the conduct occurred off-duty and the court could find no reasonable connection between the misconduct and the employee's work performance or the ability of the agency to perform its assigned mission.

Consonant with the view that there was no requirement on them to spell out how the appellant's conduct was

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[19] *Begendorf* does not support the Director's statement. In that case "[t]he only issue raised" was the claim of a procedural defect in the failure of the Government to produce certain witnesses requested by the disciplined employee. It is true some of those witnesses were expected to testify whether the discharge would "promote the efficiency of the service." But the point in issue was not whether such issue was relevant but whether the Government was required to produce witnesses for the discharged employee on that issue.

[20] *Norton v. Macy, supra*, at 1167 (417 F.2d).

[21] *Young v. Hampton, supra* (568 F.2d 1253).

[22] *Norton v. Macy, supra* (417 F.2d 1161); *Scott v. Macy* (1968) 131 U.S.App.D.C. 93, 402 F.2d 644, 649.

[23] *Fugate v. LeBaube* (N.D.Tex.1974) 372 F.Supp. 1208, 1214.

detrimental to the efficiency of the service, the agency and the several administrative bodies to which the agency's decision was appealed did not endeavor to state some "identifiable" basis for finding a detriment of the "efficency of the service" in the appellant's act. The nearest the record shows any attempt in this regard appears in the recommendation of the Director of Personnel Management, as made to the Appeals Review Board. In this recommendation, he said:

> "The case of *Ruffin v. United States*, 144 Ct.Cl. 689 (1959) established the concept that removal for assaulting a fellow employee would promote the efficiency of the service."

However, neither the Appeals Review Board nor anyone of the other reviewing parties or agencies cite *Ruffin* as the basis for the action taken. Perhaps the reason was that this case is so entirely different from *Ruffin*. In *Rffiun* the discharged employee assaulted his superior on the job and in an incident arising in connection with the employee's work. It involved a case of gross insubordination committed on the job in the presence of all the other employees. That simply is not this case.

In the present case, Biller was not the appellant's supervisor. The alleged misconduct by the appellant did not consist of insubordination toward his superior in connection with the performance of his work nor had the appellant assaulted his superior on the job in the presence of all other employees. The incident, on account of which he was discharged, arose out of a strictly private difficulty between Biller and the appellant. It took place while both were off-duty for their lunch hour and at a place remote from the work place of both of them, *i.e.*, at "an enclosed stairway separated from the rest of the building." That is in no way similar to an employee assaulting his superior on the job. *Ruffin* is inappposite.

The Commission, however, seems to have confused the facts of this case and inadvertently to have given to it a semblance of similarity to *Ruffin*. And this represents the

only possible basis for finding in the decision of the Appeals Review Board any statement of a possible reason for a finding of prejudice to the service arising out of the act of the appellant. Thus, in summarizing its conclusion, the Appeals Review Board said:

> "Although the attack was based principally on outside business problems it occurred on Federal property, at appellant's work site and was disruptive to efficient operations being conducted there."

This possible justification for its action, as stated by the Appeals Board, was as far removed from the actual facts in the case as the Director's analogy of its facts to those in *Ruffin*. The key finding by the Board seems to have been that the "attack" occurred "*at appellant's work site*," thereby disrupting "efficient operations being conducted *there*." [Italics added] As we have seen, however, this incident did not occur at the "appellant's work site" but at an "enclosed stairway separated from any work area." It thus could not have disrupted any agency operations "being conducted" at the site of the incident. Nor did the affair concern "principally outside business problem;" it related wholly and completely to "outside business problem." The only accurate statement in the Appeals Board's conclusion was that the incident occurred in a building leased by the Government, but it must be remembered, in an area remote from any work area and certainly not at "appellant's work site." It is impossible to see how an altercation between two public employees at an area remote from their work area or the work area of any other employees of the agency and while both employees were off-duty and over a matter completely unconnected with their work can be found to provide on its face a "rational basis" for a conclusion that such altercation was "disruptive to efficient operations being conducted there."

It follows that whether we assume that the Appeals Board did not make a determination on the question whether appellant's discharge would promote the efficiency

of the service because, as it said, it thought this unnecessary, or that the sentence quoted *supra* from its decision constituted its basis for a finding that the discharge did promote the efficiency of the service, the decision is fatally flawed. If the Appeals Board failed to make a specific "identifiable" finding on this point because it thought such a finding unnecessary, the Board erred as a matter of law: It is obligated to make such a finding with factual specificity. If, on the other hand, the language we have quoted is to be treated as conforming to the legal requirement of a factual justification of the discharge for the good of the service, it is defective as resting upon a completely incorrect factual basis. In either event, the administrative record does not satisfy the statutory requirement for a discharge of a public employee under § 7501 (a).

Moreover, the appellant's offense has been considerably inflated in the course of the proceedings. It is said he committed a vicious assault on Biller. But there were no blows passed between the appellant and Biller; neither suffered the slightest injury. It is said that the appellant threw a rope about Biller's neck and began choking him. Biller suggested, at another point, in his testimony, that it was much like a piece of binder's twine and the appellant indicated in his testimony it might have been a small rope such as would be used by draftsmen in making measurements on plans or drawings such as he had been working on that morning. If the appellant applied any pressure, it was minimal, since it is admitted that there was no evidence of any such pressure having been applied on Biller's neck. Biller did go to the doctor but the doctor, after examining Biller, did not give him any medication and dismissed him as in need of no medical attention of any kind. Biller was not injured in any way and was not in any real danger of being garotted, as the agency report would intimate.

There was every reason to have dismissed the whole proceedings both upon the ground that the incident was

too trivial and petty for the drastic penalty of termination of employment and upon the ground that there was no "rational basis" for a finding that the discharge would promote the efficiency of the service. And this is particularly so in the light of appellant's psychiatric disability at the time. The administrative record suggests that this point was disregarded because it was assumed that the need for psychiatric treatment by the appellant was not real but feigned. This is indicated by the comment in the record and in the argument in this Court that the appellant was never confined at the University Hospital and was free to go at will. Whether the appellant was confined or not, he was subjected to a series of shock treatments over a period of approximately ten days at the Hospital under the direction of the University psychiatrists. It cannot be assumed that these physicians would have put the appellant through such a regimen of hazardous shock treatments if they had not thought that his condition required it. Under the practice established by the Civil Service Commission, this condition of the appellant should have been taken into consideration by the agency.[24] Ordinarily we would be inclined to remand to the District Court, for further remand to the Commission to give consideration to the psychiatric condition of the appellant. This, however, is unnecessary in this case because we are convinced that the action of the ARB was arbitrary and capricious in that the record does not provide any sufficient "rational basis" for the findings commanded by § 7501(a) as a basis for the discharge of a public employee.

Accordingly the judgment of the District Court is reversed and the cause is remanded to the District Court for the entry of appropriate judgment in favor of the appellant.

REVERSED.

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[24] *See Doe v. Hampton, supra,* at 279 (566 F.2d).

K. K. HALL, Circuit Judge, dissenting:

I must respectfully dissent. I am sympathetic to the plight of Mr. Phillips, who had a long and unblemished work record and was certainly under considerable mental stress. But the fact remains that he assaulted a fellow employee on work premises and during working hours.

Tht attack on Biller was an assault whether perpetrated with a piece of twine or a hangman's noose. The attack took place on business premises whether "at an enclosed stairway" or in a working area. The attack took place during working hours whether at lunchtime or otherwise. The fact that the attack arose from a private dispute is irrelevant.

Notwithstanding the majority's heroic effort to distinguish away *Ruffin v. United States*, 144 Ct.Cl. 689 (1959), I am of the opinion that the case is controlling here. The sanction of dismissal imposed on Mr. Phillips by the Civil Service Commission Appeals Review Board was a hard one, but it was well within the discretion of the Board.

I would affirm the order of the district court.

APPENDIX K

SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE *ex rel.* THEODORE MILTON JUDY

v.

MARVIN R. KIGER, Judge of the Circuit
Court of Monongalia County, etc.

No. 12899

Submitted Jan. 28, 1970

Decided March 3, 1970

John R. Goodwin, Morgantown, for relator.

Thomas C. Cady, Morgantown, for respondent.

HAYMOND, Judge.

In this original proceeding in mandamus the petitioner, Theodore Milton Judy, a citizen, voter and taxpayer of the City of Morgantown, in Monongalia County, West Virginia, seeks a writ to require the defendant, Honorable Marvin R. Kiger, Judge of the Circuit Court of Monongalia County, West Virginia, to comply with the original judgment of the Circuit Court of Monongalia County, West Virginia, rendered September 20, 1968, in a proceeding in mandamus then pending in that court, which directed the County Court of Monolgalia County to redistrict the magisterial districts of that county as provided by law with all deliberate speed until accomplished in order to comply with the Constitution of this State.

Upon the petition and its exhibits this Court, on December 1, 1969, issued a rule returnable before this Court

January 14, 1970. By agreement of counsel for the respective parties and by leave of this Court, this proceeding was continued until January 27, 1970, when it was submitted for decision upon the petition and its exhibits, the demurrer of the defendant to the petition, the answer of the defendant, the demurrer of the petitioner to the answer, and the briefs and the oral arguments of the attorneys representing the respective parties.

The material facts are undisputed and the questions for decision are questions of law.

On September 20, 1968, in a mandamus proceeding then pending in the Circuit Court of Monongalia County, in which the petitioner Judy was relator and the County Court of Monongalia County, West Virginia, and Robert B. Nestor, Melvin Rexroad and The Rev. Hugh Boone, members of the county court, were respondents, acting by its then judge, Honorably Don J. Eddy, who his since been succeeded by the defendant as Judge of the Circuit Court of Monongalia County, entered a judgment, to which none of the parties objected, which contained this provision: "It appearing proper for the Court so to do, it is ORDERED that the writ prayed for is hereby granted and that the County Court of Monongalia County, West Virginia, their successors in office, proceed to redistrict the Magisterial District of Monongalia County, West Virginia, as provided by law, with all deliberate speed until the same is accomplished to comply with the requirements of the West Virginia Constitution."

The foregoing order was not complied with by the county court and upon a petition by Theodore Milton Judy against the County Court of Monongalia County, West Virginia, and its then commissioners, John P. Ball, Melvin Rexroad and Joseph Kun, after sufficient notice and over the objection of Judy, the circuit court, on September 16, 1969, entered a judgment which contained this provision: "It appearing proper for the Court so to do,

said County Court shall proceed with redistricting of the magisterial districts of Monongalia County as previously ordered by this Court but may wait until the results of the 1970 Census are obtained. After this information is available, they shall complete redistricting immediately."

According to the undenied allegations of the petition, the petitioner moved the circuit court to reconsider its previous ruling of September 16, 1969, and although the court was advised that the 1970 figures will not become available until 1973 and possibly 1974, the circuit court entered an order which reaffirmed its judgment of September 16, 1969.

Monongalia County consists of seven magisteral districts and the total population of the county, according to the 1960 census, is 55,617 and the total acreage of the county is 236,042, or 386.82 square miles. These districts and their areas and population are: Battelle District 36,096 acres, 1302 population; Cass District 22,214 acres, 4087 population; Clay District 40,633 acres, 3004 population; Clinton District 43,065 acres, 2998 population; Grant District 29,830 acres, 9964 population; Morgantown District, in which is located the City of Morgan and in which the petitioner resides, 25,523 acres, 30,443 population; and Union District 38,681 acres, 3819 population.

From the foregoing it is evident and undisputed that the districts are plainly and considerably unequal both in territory and population, contrary to the provisions of Article VIII, Section 27, of the Constitution of this State which provides that "Each county shall be laid off into districts, not less than three nor more than ten in number, and as nearly equal as may be in territory and population."

It is undisputed that the county court, though authorized by Section 2, Article 2, Chapter 7, Code, 1931, from

time to time to increase or diminish the number of such districts, and change the boundary lines thereof as necessity may require, in order to conform to the same provisions of the Constitution of this State, has failed and refused to comply with the original judgment of the Circuit Court of Monongalia County of September 20, 1968, to proceed to redistrict the magisterial districts of the county with all deliberate speed until such magisterial districts are redistricted.

The petitioner contends that it is the mandatory duty of he Circuit Court of Monongalia County, acting by and through the defendant, its present judge, to require compliance by the county court and its commissioners with the judgment rendered September 20, 1968; that the circuit court was without jurisdiction to modify that order by its subsequent order of September 16, 1969; and that the duty to require compliance with the judgment of September 20, 1968, is ministerial or nondiscretionary in character and may be enforced by mandamus.

On the contrary the defendant contends that the enforcement of the judgment of September 20, 1968 is discretionary and that its discretion can not be controlled by mandamus.

Though it was within the sound discretion of the circuit court to enter or to refuse to enter its judgment of September 20, 1968, and such discretion is, of course, not controllable by mandamus, after the entry of that judgment, which was not modified during the term at which it was entered or appealed within the appelate period, it was the duty of the circuit court, at the instance of citizens, voters and taxpayers of the county, to require the enforcement of that judgment and such duty is not discretionary but is ministerial or nondiscretionary in character and may be enforced in a mandamus proceeding.

In Merrill on Mandamus, Section 186, the text contains these statements: "The writ of *mandamus* has

been used most extensively to control and correct the action of inferior courts. It is used not only to restrain their excesses, but also to quicken their negligence and obviate their denial of justice. When a duty is imposed by a law upon a court, *mandamus* from a higher court is the proper means to compel the discharge of such duty. When such duty is so plain in point of law and so clear in matter of fact that no element of discretion is left as to the precise mode of its performance, such duty is ministerial, and a writ of *mandamus* to compel the performance of such duty will specify the exact mode of performance."

This Court has held in numerous cases that mandamus lies to require the discharge by public officers of a nondiscretionary duty. State ex. rel. Greenbrier County Airport Authority v. Hanna, 151 W.Va. 479, 153 S.E.2d 284; State ex. rel. Island Creek Coal Company v. Hanley, 149 W.Va. 107, 138 S.E.2d 848; State ex rel. Yahn Electric Company, Incorporated v. Baer, 148 W.Va. 527, 135 S.E.2d 687; State ex. rel. Wheeling Downs Racing Association v. Perry, 148 W.Va. 68, 132 S.E.2d 922; State ex rel. Williams v. The Board of Trustees of The Policemen's Pension or Relief Fund of the City of Charleston, 147 W.Va. 795, 131 S.E.2d 612; The W. E. Long Co-Independent Bakers' Cooperative v. Burdett, 147 W.Va. 177, 126 S.E.2d 181, and the many cases cited in the opinion in that case.

In the recent case of State ex rel. Sangster v. Sencindiver, W.Va., 170 S.E.2d 673, this Court held that it was the mandatory duty of the judge of a circuit court to dismiss certain parties, as required by Section 34, Article 4, Chapter 56, Code 1931, as amended, on the ground of misjoinder and that mandamus lies to compel the performance of such duty. It is clear that in that case the duty of the circuit court to dismiss the parties from the case was a ministerial or nondiscretionary duty. In Barnes v. Warth, 124 W.Va. 773, 22 S.E.2d 547, this

Court awarded a writ of mandamus which required the judge of the Common Pleas Court of Cabell County to vacate and set aside an order previously entered by him which permitted a defendant to file an answer in a suit after the expiration of 15 days from the date of an order which overruled a demurrer to an amended bill of complaint. In Biggs v. Moats, 117 W.Va. 14, 183 S.E. 603, this Court held in point 2 of the syllabus that the Supreme Court of Appeals may by mandamus require a trial chancellor to enforce a decree entered by him awarding suit money to a woman to enable her to prosecute an appeal from an adverse decree in a divorce suit. In Miller v. Baer, 114 W.Va. 566, 172 S.E. 612, this Court awarded a writ of mandamus to require the judge of the Domestic Relations Court of Cabell County, to enforce by process of contempt, its prior decree awarding attorney's fee and suit money in a divorce proceeding. In McComas v. Warth, 113 W.Va. 163, 167 S.E. 96, this Court held that mandamus will issue to compel an inferior court to vacate a judgment which is not in accord with the verdict of a jury and to enter a proper order. In State ex rel. Neill v. Nutter, 99 W.Va. 146, 128 S.E. 142, this Court required a circuit court by mandamus to receive and enter a verdict which was in proper form and represented the final agreement of the jury. In State ex. rel. Chafin v. Bailey, 106 W.Va. 32, 144 S.E. 574, this Court held that when a sentence has been duty and properly pronounced by the trial court in a murder case which is affirmed on appeal and the case is remanded to the trial court with directions to take proper action to carry its judgment into effect mandamus will issue to compel the court to take proper action to carry out the sentence originally pronounced and affirmed. In the opinion in that case this Court said: "* * * it is the ministerial duty of the trial court to enter an order fixing a further time for the execution of the sentence already pronounced, * * *." In the early case of Summers County v. Monroe County, 43 W.Va. 207, 27 S.E. 307, in which this Court

dismissed a writ of error to a judgment of the Circuit Court of Greenbrier County which refused to appoint commissioners, this Court said in point 1 of the syllabus that "The function of a circuit court, under Code 1891, c. 39, s. 18, in appointing commissioners to settle lines between counties, is ministerial, and legislative or administrative, and the court is "without power to refuse such appointment on application of a county court of one of the counties. In case of its refusal, *mandamus* from this court is the remedy, not a writ of error. This court has no jurisdiction of such writ of error."

Under the foregoing authorities, and others to the same effect which need not be cited or discussed, it is the ministerial or nondiscretionary duty of the Circuit Court of Monongalia County to enforce its original order of September 20, 1968, requiring the County Court of Monongalia County to proceed with all deliberate speed to redistrict the magisterial districts of Monongalia County, West Virginia, in the manner provided by law and, in as much as more than a year and four months have elapsed since the entry of that judgment and all deliberate speed may now be properly held to mean forthwith or immediately, the county court should be required by the circuit court to begin to redistrict the magisterial districts of the county forthwith and to proceed with due diligence in the performance of its duty to comply with the mandate of the Constitution of this State.

A writ of mandamus will issue to require a circuit court to discharge the ministerial duty of enforcing its original final judgment which was not subject to subsequent change or modification and which required a county court to proceed with all deliberate speed to redistrict the magisterial districts of the county, as provided by law, to comply with the provisions of Article VIII, Section 27, of the Constitution of this State.

Prior to the effective date of the Rules of Civil Procedure, which was July 1, 1960, many decisions of this

Court held that after the entry of a final judgment in a suit and the adjournment of the term at which it was entered the court can proceed no further in it by any adjudication affecting the rights or the interests of the parties; that the court has no further jurisdiction of the subject matter or the parties in the same proceeding, in the absence of statute conferring continuing jurisdiction; and that any subsequent judgment is a nullity unless effected by one of the established methods for the review and reversal of such final decree. Edlis, Inc. v. Miller, 132 W.Va. 147, 51 S.E.2d 132; Brown v. Brown, 135 W.Va. 579, 64 S.E.2d 620, and the many cases cited in the opinion in that case. In Vencill v. Vencill, 103 W.Va. 708, 138 S.E.2d 781, this Court held in point 2 of the syllabus that a final decree upon the merits after answer filed can not be reheard, reviewed or otherwise disturbed in the court below, after the end of the term at which it was pronounced, except for such matter as constitutes ground for a bill of review for error apparent in the decree, bill of review for newly discovered evidence, or an original bill to impeach it for sufficient cause, such as fraud in its procurement. The rule of the cited cases, however, does not apply to proceedings within the Rules of Civil Procedure which operate to change such rule, but it does apply to a mandamus proceeding which is not governed by the Rules of Civil Procedure. Accordingly, the judgment of the circuit court rendered September 16, 1969, which undertook to modify the prior unappealed original judgment of September 20, 1968, was void and of no force or effect because the circuit court was without jurisdiction to modify or change its prior judgment of September 20, 1968.

A wit of mandamus requiring the circuit court to direct the county court to begin forthwith to redistrict the magisterial district of Monongalia County, as provided in the order of September 20, 1968, is awarded by this Court.

Writ awarded.

APPENDIX L

§ 5596. Back pay due to unjustified personnel action

(a) For the purpose of this section, "agency" means—

(1) an Executive agency;

(2) the Administrative Office of the United States Courts;

(3) the Library of Congress;

(4) the Government Printing Office; and

(5) the government of the District of Columbia.

(b) (1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee—

(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect—

(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period; and

(ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice

or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title [5 USCS §§ 7101 et seq.], shall be awarded in accordance with standards established under section 7701(g) of this title [5 USCS § 7701(g)]; and

(B) for all purposes, is deemed to have performed service for the agency during that period, except that—

(i) annual leave restored under this paragraph which is in excess of the maximum leave accumulation permitted by law shall be credited to a separate leave account for the employee and shall be available for use by the employee within the time limits prescribed by regulations of the Office of Personnel Management, and

(ii) annual leave credit under clause (i) of this subparagraph but unused and still available to the employee under regulations prescribed by the Office shall be included in the lump-sum payment under section 5551 or 5552(1) of this title [5 USCS § 5551 or § 5552(1)] but may not be retained to the credit of the employee under section 552(2) of this title [5 USCS § 5552(2)].

(2) This subsection does not apply to any reclassification action nor authorize the setting aside of an otherwise proper promotion by a selecting official from a group of properly ranked and certified candidates.

(3) For the purpose of this subsection, "grievance" and "collective bargaining agreement" have the meanings set forth in section 7103 of this title [5 USCS § 7103], "unfair labor practice" means an unfair labor practice described in section 7116 of this title

[5 USCS § 7116], and "personnel action" includes the omission or failure to take an action or confer a benefit.

(c) The Office of Personnel Management shall prescribe regulations to carry out this section. However, the regulations are not applicable to the Tennessee Valley Authority and its employees.